Supreme Court, U.S.
FILED
JAN 20 2011
OFFICE OF THE CLERK

No. 10-239

In The
Supreme Court of the United States

JOHN MCCOMISH, et al.,

Petitioners,

v.

KEN BENNETT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE WYOMING LIBERTY GROUP IN SUPPORT OF PETITIONERS

WYOMING LIBERTY GROUP
BENJAMIN T. BARR*
STEPHEN R. KLEIN
1902 Thomes Ave.
Ste. 201
Cheyenne, WY 82001
(240) 863-8280
Benjamin.Barr@gmail.com
Counsel of Record

CUNKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Nothing Clean About Clean Elections: Only the Anointed May Speak	3
a. Matching Funds and This Court's Coerced Speech Cases	5
b. Strict Scrutiny is Warranted for Speech Triggers Like Those Found in Arizona	12
II. A Cold Breeze in Arizona: Frozen, Chilled, or Lukewarm Standards?	15
a. Arizona's Matching Funds Effectuate Classical Chilling	17
b. Inter-Circuit Deterioration of the Chilling Effects Doctrine Spells Constitutional Anarchy	22
III. Of "Metaphysical Harms" and Bloodied Noses: The Ninth Circuit's Errant First Amendment Injury Inquiry	25
a. The Harms Alleged by Petitioners Adequately Satisfy This Court's Standards	26

TABLE OF CONTENTS – Continued

Page

b. Devolution of the Chilling Effects Doctrine into an Ad Hoc, Case-by-Case Inquiry Causes Serious Harms 32

IV. Keep Speech Standards Simple: Building on the Import of *Citizens United* 34

a. The Tie Goes to the (Chilled) Speaker... 35

b. Toward a Cohesive Speech-Protective Standard 36

CONCLUSION 40

TABLE OF AUTHORITIES

Page

CASES

Adult Video Ass'n v. Barr, 960 F.2d 781 (9th Cir. 1992) 24

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 13

Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1983) 37

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

California Med. Ass'n v. FEC, 453 U.S. 182 (1981) 20

Carey v. Brown, 447 U.S. 455 (1980) 13

Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) 20

Citizens United v. FEC, 130 S.Ct. 876 (2010) ..... *passim*

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) 10

Consolidated Edison Co. of New York, Inc. v. Power Service Comm'n of New York, 447 U.S. 530 (1980) 12, 13

Cox v. State of Louisiana, 379 U.S. 536 (1965) 12

Daggett v. Comm'n on Gov'tal Ethics and Election Practices, 205 F.3d 445 (1st Cir. 2000) 23

Davis v. FEC, 554 U.S. 724 (2008) ..... *passim*

Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994) 8, 10, 23

Dombrowski v. Pfister, 380 U.S. 479 (1965) 18, 19, 24

TABLE OF AUTHORITIES

Page

Emily's List v. FEC, 581 F.3d 1 (D.C. Cir. 2010) 20

Eu v. San Francisco County Democratic Central Comm., 489 U.S. 214 (1989) 5

FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) 17, 20, 39

FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449 (2007) .....*passim*

Gooding v. Wilson, 405 U.S. 518 (1972) 19

Grosjean v. American Press Co., 297 U.S. 233 (1936) 35

In Re Primus, 436 U.S. 412 (1978) 37

Laird v. Taitum, 408 U.S. 1 (1972) 17

Lamont v. Postmaster General, 381 U.S. 301 (1965) 22

Lopez v. Canadaela, 2010 WL 512866 (9th Cir. 2010) 24

McComish v. Bennett, 611 F.3d 510 (2010) .....*passim*

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 6, 7, 8, 35

Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217 (1967) 37

NAACP v. Alabama, 357 U.S. 449 (1958) 37

NAACP v. Button, 371 U.S. 415 (1963) 15, 16

N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake, 524 F.3d 427 (4th Cir. 2003) 23, 37

TABLE OF AUTHORITIES

Page

National Endowment for the Arts v. Finley, 524 U.S. 569 (1998) 9

New York Times v. Sullivan, 376 U.S. 254 (1964) 15

Pacific Gas & Elec. Co. v. Public Util. Comm'n of California, 475 U.S. 1 (1986) 6, 7, 27, 28, 29

Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972) 12, 13, 37

Randall v. Sorrell, 548 U.S. 230 (2006) 26, 30, 31

R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) 7, 12

Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969) 7, 8

Republican Party of Minnesota v. White, 536 U.S. 765 (2002) 5, 14, 15

Riley v. National Fed. of the Blind of North Carolina, Inc., 487 U.S. 781 (1988) 8

SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010) 20

Speiser v. Randall, 357 U.S. 517 (1958) 39

Stanley v. Georgia, 394 U.S. 557 (1969) 37

Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134 (9th Cir. 2000) 24

Thornhill v. Alabama, 310 U.S. 88 (1940) 18

United States v. American Library Ass'n, 539 U.S. 194 (2003) 9

United States v. Robel, 389 U.S. 258 (1967) 37

TABLE OF AUTHORITIES

Page

United States v. Stevens, 130 S.Ct. 1577 (2010).....21, 22

Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008).....21

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).....10

Wooley v. Maynard, 430 U.S. 705 (1977).....7, 10

Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976).....13

Younger v. Harris, 401 U.S. 37 (1971).....18

CONSTITUTION AND STATUTES

U.S. Const. amend. I .....*passim*

A.R.S. § 16-940(A).....3, 5

A.R.S. § 16-947.....12

A.R.S. § 16-951.....12

A.R.S. § 16-952(A).....4, 5, 13

A.R.S. § 16-952(B).....4, 5, 13

A.R.S. § 16-952(C).....4, 5, 13

OTHER SOURCES

Federal Communications Commission, *Fairness Doctrine Report*, 102 F.C.C.2d 143 (1985).....7

Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L.REV. 1321 (2000).....39

TABLE OF AUTHORITIES

Page

Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991).....37

Moran Horwitz, *In Memoriam: William J. Brennan*, 111 HARV. L.REV. 23 (1997).....15

Seth Mydans, *For Arizonans, the Political Circus Is Back in Town*, N.Y. TIMES, Jan. 16, 1992 at A12, *available at* http://www.nytimes.com/1992/01/16/us/for-arizonans-the-political-circus-is-back-in-town.html.....4

Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L.REV. 808 (1969).....23

Lewis Carroll and Martin Gardner, THE ANNOTATED ALICE, ALICE'S ADVENTURES IN WONDERLAND 35 (1960).....14

INTEREST OF *AMICUS CURIAE*[1]

The Wyoming Liberty Group believes that the great strength of Wyoming rests in the ambition and entrepreneurialism of ordinary citizens. While limited government is conducive to freedom, unchecked government promotes the suppression of individual liberty. In a state where the people are sovereign, the Group's mission is to provide research and education supportive of the founding principles of free societies. Its mission is to facilitate the practical exercise of liberty in Wyoming through public policy options that are faithful to protecting property rights, individual liberty, privacy, federalism, free markets, and decentralized decision-making. The Wyoming Liberty Group promotes the enhancement of liberty to foster a thriving, vigorous, and prosperous civil society, true to Wyoming's founding vision. The issues presented in this case are of interest to the Wyoming Liberty Group because they involve the fundamental, and threatened, right of citizens to freely participate and share their point of view in the electoral and political process.

---

[1] This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or their counsel, make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

1. Arizona's experiment in speech leveling suffers from similar flaws found in other coerced-speech cases, rendering it invalid under any level of scrutiny. The Ninth Circuit's failure to value the import of free speech in public life has undone the chilling effects doctrine.

2. This Court should affirm its chilling effects doctrine, affording bright line adjudication and remedial standards for all speakers nationwide.

3. More than one thousand pages of injuries, expert testimony, and evidence submitted in the Joint Appendix explain why this Court should liberalize its chilling effects doctrine. The Ninth Circuit's manipulation of the chilling effects doctrine should be reversed to establish salient standards protective of representative speech.

4. This Court should announce an easily understood chilling effects doctrine that would afford future speakers streamlined methods of adjudicating free speech challenges.

ARGUMENT

The speech levelers have returned. Before this Court stands the muting howl of egalitarianism.[5] An intense interest in speech handicapping – the very interest deemed antithetical to the First Amendment by this Court in *Buckley v. Valeo* – finds itself increasingly wed to campaign finance systems around the nation. 424 U.S. 1, 49 (1976) (The "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). The Constitution demands a simple divorce, forever severing this Bergeronesque interest from this Court's First Amendment jurisprudence.

I. Nothing Clean About Clean Elections: Only the Anointed May Speak

Arizona's experimentation with the speech leveling effects of the Citizens Clean Elections Act currently stands before this Court for constitutional review. The system that dares not speak its own name – The Arizona Speech Handicapping Project – imposes a carefully designed system to favor speakers who curry favor with the state while silencing those outside the fold. Curiously labeled clean, Arizona's

---

[5] *See* A.R.S. § 16-940(A) (declaring the purpose of Arizona's "Clean Elections" to make clean all political discourse and elections "by diminishing the influence of special-interest money").

system ensures that real injuries are worked against speakers just because they wish to have nothing to do with the state's "Clean Elections" project.

Born out of a desire to limit the harms of briberies and other illicit dealings like those found arising out of the AZscam controversy, the people of Arizona passed the Citizens' Clean Elections Act by popular initiative in 1998.[3] Like using a sledgehammer to extinguish the nuisance of a cricket's chirp, Arizona's project runs far and wide over protected speech and association in pursuing its goal of political purity. Not content with being overbroad, the system's focus is lopsided due to reliance on speech-inhibiting "matching funds." A.R.S. § 16-952(A)-(C). As such, it does very little to combat real corruption found in *quid pro quo* arrangements of the tried-and-true *Buckley* variety, while doing a great deal to otherwise limit and abridge speech through its matching funds program.

In a move of marketing genius, matching funds are touted as a means to "enable" the "speech of [traditional candidates'] opponents" rendering them, at least superficially, as constitutionally suspect as Quaker Oats. *McComish v. Bennett*, 611 F.3d 510, 524 (2010). All bravos for clever titles aside, when examined in

---

[3] Seth Mydans, *For Arizonans, the Political Circus Is Back in Town*, N.Y. TIMES, Jan. 16, 1992 at A12, *available at* http://www.nytimes.com/1992/01/16/us/for-arizonans-the-political-circus-is-back-in-town.html.

the deeper context of this Court's First Amendment jurisprudence, Arizona's matching fund program establishes content-based speech triggers that work real, if sometimes difficult to detect, injuries against political speakers that must be stricken unless the law is narrowly tailored to serve a compelling governmental interest. *See, e.g., Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002); *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222 (1989).

a. Matching Funds and This Court's Coerced Speech Cases

This case would present little controversy if the "Clean Elections" system was just a rising tide that lifted all First Amendment boats. *See Davis v. FEC*, 554 U.S. 724, 737 (2008) (had the Federal Election Campaign Act "simply raised the contribution limits for all candidates, Davis' argument would plainly fail"). Instead, Arizona's project achieves another interest entirely: Speech redistribution. This is accomplished by affording special benefits only to state-favored candidates. *See* A.R.S. § 16-952(A)-(C).

The primary purpose of Arizona's "Clean Elections" system is found in an interest thought traditionally adverse to the First Amendment – "diminishing the influence of special-interest money." A.R.S. § 16-940(A). Stated another way, Arizona's project aims to reduce the influence of some speakers while enhancing the influence of others, namely those

favored by the state as "clean" candidates. Independent voices need not apply.

The "Clean Elections" system found in Arizona closely resembles the speech-redistributing program before this Court in *Davis*, 554 U.S. 724 (2008). There, this Court struck down an asymmetrical contribution limit scheme because the "vigorous exercise of the right to use personal funds to finance campaign speech produce[d] fundraising advantages for opponents in the competitive context of electoral politics." *Id.* at 739. Unsatisfied with the disastrous speech leveling effects of the Millionaire's Amendment found in *Davis*, Arizona goes where few states have gone before. It delivers actual, rather than hypothetical, cold-hard-cash benefits to one class of candidates: Those favored by the state, the "clean." Chilling.

What this Court noted in *Davis* holds true: Laws that apply uniformly and which respect the bounds of the First Amendment will ordinarily pass scrutiny. But when government enacts uneven, asymmetrical, lopsided burdens that are triggered due to disfavored speech by the state, or which picks winners and losers out of the marketplace of ideas, serious constitutional problems arise. *See, e.g.*, *Pacific Gas & Elec. Co v. Public Util. Comm'n of Cal.*, 475 U.S. 1 (1986) (plurality opinion); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). Arizona enjoys no authority to "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensbury Rules," but that is precisely what

"clean elections" achieves. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992).

It is helpful to examine this Court's trilogy of coerced speech case sets in order to see why Arizona's project is unconstitutional. Pinpointing the unique burdens found in each line of cases illustrates that Arizona's "Clean Elections" system is simply more of what has come before the Court in the past: Unoriginal, state-centered efforts to prop up certain speakers while hushing disfavored speakers.

A first line of coerced speech cases ("Carrying Cases"), represented by *Miami Herald Publishing Co.*, involve regulatory programs where: Government invokes a supposed authority to set (1) speech triggers that demand supplementary (2) coerced support for others' speech, and which include (3) direct cost, space, or physical burdens. *Pacific Gas & Elec. Co.*, 475 U.S. 1; *Wooley v. Maynard*, 430 U.S. 705 (1977); *Miami Herald*, 418 U.S. 241.[4] The result in each

---

[4] *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969) is a notable exception to this trend. *Red Lion* is an anomaly in First Amendment jurisprudence and relates to the scarcity of access to public airwaves. Beyond that, the Court noted the precariousness of the doctrine in its opinion by explaining that "if experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications." *Id.* at 393. The resulting validity of *Red Lion* is questionable. 1985 Federal Communications Commission, *Fairness Doctrine Report*, 102 F.C.C.2d 143, 158-96 (1985) (where the Federal Communication Commission explains that the Fairness Doctrine inhibits, rather

(Continued on following page)

instance is without much guesswork: Government possesses no ability to adjust our veritable marketplace of ideas through contrived traps, triggers, and talliates. *Miami Herald*, 418 U.S. at 247 ("Government-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate'"). Indeed, this Court reaffirmed in *Riley v. National Fed. of the Blind of North Carolina, Inc.* that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind." 487 U.S. 781, 797 (1988) (internal quotation marks omitted).

A second line of cases ("Non-Carrying Cases"), as represented by *Davis*, involve: (1) Speech triggers that coerce private individuals to (2) support ideological opponents, but which (3) lack direct cost, space, or physical burdens. 554 U.S. 724 (striking down a system that penalized speakers for the "vigorous exercise of the right to use personal funds to finance campaign speech"); *Day v. Holahan*, 34 F.3d 1356, 1360 (8th Cir. 1994) ("The knowledge that a candidate who one does not want to be elected will have her spending limits increased and will receive a public subsidy equal to half the amount of the independent expenditure, as a direct result of that independent expenditure, chills the free exercise of that protected speech"); *Buckley*, 424 U.S. at 57 n.65

---

than promotes, the First Amendment and questions the constitutional validity of *Red Lion Broadcasting*).

(Congress "may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations" though such conditions must be constitutional and non-coercive). In that sense, these cases are one step removed from the first in that they do not demand would-be speakers to directly carry the message of their opponents. Even so, this Court has found it damning enough that speech triggers invoke inhibitions against speech in the first place, rendering them constitutionally void. When government demands that speakers are forced to choose between the "First Amendment right to engage in unfettered political speech" and speech triggers that benefit their ideological opponents, the First Amendment wins. *Davis*, 554 U.S. at 726.

A third line of cases ("Subsidizing Cases"), as represented by *National Endowment for the Arts v. Finley*, include an absence of speech triggers with indirect coerced support for controversial speech, and do not involve cost, space, or physical burdens. 524 U.S. 569 (1998). Because this third class merely creates more speech without disincentivizing others, this Court has upheld these programs. *See, e.g., Finley, id.*; *United States v. American Library Ass'n*, 539 U.S. 194 (2003) (plurality opinion) (upholding the requirement of installing Internet content filters before libraries could receive federal subsidies). Thus, where government makes available a speech or speech-enabling subsidy to everyone, this Court has found no cognizable First Amendment harm.

It is important to note that in the Non-Carrying Cases, no direct ownership, physical burden, or cost disincentives were imposed on would-be speakers by the state, yet the programs were equally repugnant under the Constitution. These cases all involve the furtherance of this Court's recognition of the import in protecting the individual freedom of mind. Stated more concretely, government attempts to favor some discussion at the expense of disfavored speech "transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Wooley*, 430 U.S. at 714 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

The Non-Carrying line of cases proves an observation of import, namely that this Court has taken seriously the need to protect against self-censorship that occurs from the operation of laws that accrue select benefits to some because others exercised their First Amendment rights. This is so because even without "direct government censorship," self-censorship "is no less a burden on speech that is susceptible to constitutional challenge." *Day*, 34 F.3d at 1360; *see also City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757-58 (1988). While government may become more adept at stifling speech through quiet and subtle regimes of self-censorship, a clarification of this Court's chilling effects doctrine would help protect the full scope of

the First Amendment from speech handicapping programs nationwide.

Arizona's "Clean Elections" project is a carefully constructed program designed to afford speech benefits to a limited class while ensuring that disfavored speech will be dampened. As discussed more thoroughly in Section III.A, *infra*, Arizona's project works cognizable harms against those independent of the state ("unclean" or "traditional" candidates) just for speaking against those who curry favor with the state. The remaining question is whether Petitioners should be forced to shoulder the burden of compiling lengthy expert opinions, affidavits, and protracted evidentiary support just to speak or whether this Court's chilling effects doctrine suggests an easier and more direct remedy of constitutional injuries of this ilk. *See, e.g., Citizens United v. FEC*, 130 S.Ct. 876, 889 (2010) ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day"). The Ninth Circuit's cursory invocation of intermediate scrutiny while imposing daunting evidentiary requirements on would-be speakers must be reversed by this Court.

b. Strict Scrutiny is Warranted for Speech Triggers Like Those Found in Arizona

A keystone principle of First Amendment jurisprudence rests in this simple rule: "government may not regulate [speech or actions] based on hostility – or favoritism – towards the underlying message expressed." *R.A.V.*, 505 U.S. at 386. That principle goes a step further because it is of no particular defense that Arizona's project might not discriminate against particular viewpoints. The First Amendment demands that speech handicapping regimes which inhibit "public discussion of an entire topic" are equally invalid. *Consolidated Edison Co. of New York, Inc. v. Power Service Comm'n of New York*, 447 U.S. 530, 538 (1980). In short, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

Arizona's "Clean Elections" system is a carefully marketed government censorship program of the most odious form. *See Cox v. State of Louisiana*, 379 U.S. 536, 580 (1965) (opinion of Black, J.). Arizona generously supports those candidates deemed "clean" and who wish to incur the financial patronage of the state. A.R.S. § 16-947. State-bankrolled candidates receive a generous dole from the state to fund their primary and general campaigns. A.R.S. § 16-951 (detailing state cash-drops to "clean" candidates). And what remains particularly offensive, beyond the absurd notion of the state funding political actors'

campaigns in the first place, is the ratcheting effect of its handicapping "matching" funds – promising nearly a dollar of government subsidized cash to those candidates deemed "clean" by the state when independent voices speak. A.R.S. § 16-952(A)-(C). In this sense, Arizona's project falls by the way of similar programs brought before this Court in the past, all of which, cleverly or not-so-cleverly, push some voices out of the marketplace of ideas in order to favor others. *See, e.g.*, *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983); *Consolidated Edison Co.*, 447 U.S. at 535-36; *Carey v. Brown*, 447 U.S. 455, 462-63 (1980); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63-65 (1976) (plurality opinion); *Mosley*, 408 U.S. 92, 95-96 (1972).

A review of Arizona's "Clean Elections" law must invoke strict, and in this case, fatal, scrutiny because it inflicts speech burdens based on the identity of disfavored speakers and unpopular speech. In its most basic form, Arizona's project works unconstitutional harms against those who speak against the state – a notion commonly attributed to totalitarian regimes, but never permitted in this Republic. "Clean elections" assures purity of political discourse by silencing speech against state-favored candidates. Purity indeed.

In Arizona, there are three tiers of speakers. First Class speakers are deemed "clean" by the state because they agree to take government money. Curious. Second Class speakers are deemed "unclean" because they wish to maintain a healthy degree of

independence from the state and otherwise eschew government funding of their campaign. Curiouser. Those speakers who struggle to maintain an identity separate from the state and who struggle to find private support for their own campaigns are saddled with the burdens of the "Clean Elections" law. There is also a third class of speakers in Arizona damaged by "clean elections," and confined to Steerage: Dissenting citizens. Those few individuals who dare assemble together, like those found in the Arizona Free Enterprise PAC, will face near dollar-for-dollar government subsidies given for every dollar they use to speak out against state-sponsored candidates. Curiouser and curiouser.[5] Unlike "non-participating" candidates, these independent groups cannot avail themselves of any state benefits, damning them to the ninth layer of Arizona's unconstitutional inferno.

As recognized in *Republican Party of Minnesota* and elsewhere, government systems that impose burdens on speech due to the basis of its content must be subject to strict scrutiny. 536 U.S. at 774. Here, where the State of Arizona has saddled unique burdens upon a particular class – individuals and independent candidates who speak against state-favored candidates – strict scrutiny must necessarily apply. To survive this often-fatal review, Arizona must meet the heavy burden that a compelling interest exists to

---

[5] Lewis Carroll and Martin Gardner, THE ANNOTATED ALICE, ALICE'S ADVENTURES IN WONDERLAND 35 (1960).

stifle "special-interest" speakers that is narrowly tailored. *Id.* But Arizona employed an instrument far too blunt to accomplish any recognized interest in combating corruption in the state's political process. That the system in question delivers a chill renders it no less constitutionally suspect than a direct ban of speech.

II. A Cold Breeze in Arizona: Frozen, Chilled, or Lukewarm Standards?

The development of the chilling effects doctrine marked a substantial contribution to the preservation of our republican democracy by Justice Brennan.[6] The doctrine admits a simple truth: Debate on public issues must be "uninhibited, robust, and wide-open" in a healthy civil society. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). To do so, First Amendment freedoms need "breathing room" to survive. *NAACP v. Button*, 371 U.S. 415, 433 (1963). To provide breathing room for protected First Amendment liberties, judicial doctrine must continue to recognize the same – stringently, consistently, and in a principled manner. The Ninth Circuit's callous treatment of the chilling effects doctrine works real injuries against

---

[6] Admittedly, Professor Paul Freund developed the term "chilling effects" in 1951 and Chief Justice Warren went so far as to quote Freund in a 1961 dissent. Justice Brennan was the first Justice to develop the concept into an actualized doctrine of the Court in 1958. *See* Moran Horwitz, *In Memoriam: William J. Brennan, Jr.*, 111 HARV. L. REV. 23 (1997).

speakers, demanding adjustment by this Court. *See McComish*, 611 F.3d at 522-23 (2010) ("*Davis* does not require this Court to recognize mere metaphysical threats to political speech as severe burdens. We will only conclude that the Act burdens speech to the extent that Plaintiffs have proven that the specter of matching funds has actually chilled or deterred them from accepting campaign contributions or making expenditures").

The degree to which courts recognize the need for liberalized breathing room for First Amendment liberties affects the realization of free speech and association in civil society. Recently, Chief Justice Roberts noted this importance in *FEC v. Wisconsin Right to Life, Inc.* ("*WRTL*"), where speakers were faced with vague and elaborate speech codes that infringed upon the very essence of their breathing room in which to exercise their First Amendment rights. 551 U.S. 449, 469 (2007) (quoting *Button*, 371 U.S. at 433). Permitting the wrong type of chilling effects standard to remain at the Ninth Circuit will ensure a bevy of litigation of how much chill is enough to substantiate a First Amendment claim. This only leads to an "expert-driven inquiry, with an indeterminate result. Litigation on such a standard may or may not accurately predict electoral effects, but it will unquestionably chill a substantial amount of political speech." *Id.* To remedy this injury upon speakers nationwide, this Court should clarify its chilling effects doctrine to avoid the error found in the Ninth Circuit. *McComish*, 611 F.3d at 522-23.

a. Arizona's Matching Funds Effectuate Classical Chilling

"Mere metaphysical threats." *McComish*, 611 F.3d at 522. This is how the Ninth Circuit Court of Appeals characterized the voluminous record assembled by Petitioners demonstrating harm after harm suffered by the speakers gathered before this Court. *Id.* Weighing in at more than one thousand pages, the Ninth Circuit submits this record proves insufficient. Under this analysis, bloodied constitutional noses are inadequate to establish cognizable harms. Petitioners must suffer the most damning blows to their constitutional liberties before justice may be had.

It is important to remember what this Court held true in *Laird v. Tatum*: "governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights." 408 U.S. 1, 13 (1972). In fact this Court realized this principle in the context of campaign finance reform in *FEC v. Massachusetts Citizens for Life* ("*MCFL*"), where portions of the Federal Election Campaign Act were held unconstitutional because "government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." 479 U.S. 238, 265 (1986). To uphold the Ninth Circuit Court of Appeals' flippant brush-aside of the import of this doctrine would be to regress First Amendment jurisprudence by decades. Citizens rely on this Court

to provide meaningful standards of review, efficient and streamlined in nature, to protect their constitutional liberties.

The Ninth Circuit Court of Appeals' analysis of the relative burden placed on speakers in Arizona proved markedly errant because it failed to incorporate the premises of the chilling effects doctrine. Instead, it demanded that the Petitioners demonstrate, with pinpoint precision, each and every speech injury they suffered arising out of "clean elections." Stated more directly by the lower court, "We will only conclude that the Act burdens speech to the extent that Plaintiffs have proven that the specter of matching funds has *actually* chilled or deterred them from accepting campaign contributions or making expenditures." *McComish*, 611 F.3d at 523 (emphasis added). In doing so, the Ninth Circuit Court of Appeals turned the chilling effects doctrine on its head.

It remains true that the mere existence of a subjective chill is insufficient to strike down state action. *Younger v. Harris*, 401 U.S. 37, 50 (1971). However, where the vagueness or overbreadth of a statute is sufficiently alleged to cover the conduct of the complaining parties, the chilling effects doctrine ensures that speakers need not defend prosecution after prosecution just to vindicate their rights. *Dombrowski v. Pfister*, 380 U.S. 479, 490-91 (1965). In that vein, *Thornhill v. Alabama*, 310 U.S. 88 (1940), remains controlling precedent, permitting would-be speakers to challenge overly broad statutes facially by demonstrating that the reach of the challenged

law inhibits the speech or conduct of the complaining parties (or others similarly situated). This holds most especially here, where this Court has already declared that similar speech-trigger laws constitute a cognizable harm under the First Amendment. *See* Section I.B, *supra*.

Whatever the proper extent of its scope, the chilling effects doctrine must certainly not demand that would-be speakers submit more than one thousand pages of evidentiary support to pinpoint examples of speech infringement. This seems exactly the course the Ninth Circuit has demanded. *See McComish*, 611 F.3d at 523-34 (detailing various instances in the record where the Ninth Circuit faulted Petitioners for failure to describe actual harms). Rather, the proper scope of the chilling effects doctrine holds that where speakers (or others similarly situated) have engaged or will engage in a similar course of conduct, and the inherent overbreadth or vagueness of the law in question extends the scope of permissible regulation to an impermissible reach, review is proper. As this Court has stated, "At least when statutes regulate or proscribe speech . . . the transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972) (quoting *Dombrowski*, 380 U.S. at 486).

Once the threshold inquiry of standing and judicial review has been met, a law that unconstitutionally infringes a challenger's speech should not suddenly face intermediate scrutiny just because there is a facial component to the challenge. After all, one of this nation's most seminal election law cases, *MCFL*, invalidated an overbroad provision of the FECA because it "infringe[d] protected speech without a compelling justification." 479 U.S. at 263. But the Ninth Circuit would demand that speakers relying on this Court's chilling effects doctrine must accept intermediate, rather than strict, scrutiny because of the hypothetical nature of the injury. Here, the lower court explained that the burden in question was "merely a theoretical chilling effect" which "does not actually prevent anyone from speaking in the first place or cap campaign expenditures" and the resulting "burden created by the Act is most analogous to the burden of disclosure and disclaimer

---

The Ninth Circuit Court of Appeals argument that this challenge does not involve expenditure limits is similarly flawed. Where a law has an indirect inhibitory effect on campaign expenditures, it will be deemed an expenditure limit, and subject to strict scrutiny, no matter its cunning title. *California Med. Ass'n v. FEC*, 453 U.S. 182, 202-03 (1981) (opinion of Blackmun, J.); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *Emily's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2010) (invalidating federal limits on contributions to independent political action committees due to their function as an expenditure limit); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (invaliding federal limits on contributions to independent political action committees).

requirements in *Buckley* and *Citizens United*." *McComish*, 611 F.3d at 525. That the Petitioners raised their challenge as-applied and facially does nothing to lessen the burden, or standard of review, in this matter.

Just this last term, this Court decided *United States v. Stevens*, which concerned a federal ban of depictions of animal cruelty. 130 S.Ct. 1577 (2010). While the government pled for a relaxed standard of review, this Court relied on *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008), to note that a speech-suppressing law will be invalidated under the First Amendment pursuant to the overbreadth doctrine if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Stevens*, 130 S.Ct. at 1587. Upon a showing that the speech-inhibiting law in question suffers from facial constitutional flaws, no murky diversion into intermediate scrutiny is warranted. Once a reviewing court decides that the law has a substantial number of applications that would be unconstitutional, the inquiry ends. *Id.* at 1592.

In Arizona, kickback prohibitions, anti-bribery statutes, or traditional campaign finance reform statutes could have addressed the substantive evils found in Arizona's corrupt past without inhibiting the expressive activities of the Petitioners. By employing an overbroad, prophylactic law against would-be speakers in the state, severe burdens were established and heavily discounted by the Ninth Circuit

Court of Appeals. Speech burdens that are, in part, hypothetical, remain injurious, and subject to strict scrutiny, because of their inhibitory effect – this is the very purpose of Justice Brennan's chilling effect doctrine, and the very doctrine ignored by the Ninth Circuit Court of Appeals. *See, e.g., Lamont v. Postmaster General*, 381 U.S. 301, 305 (1965) (Brennan, J., concurring) ("inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government"). And this is the core truth of the overbreadth doctrine as most recently interpreted by this Court in *Stevens*.

The Joint Appendix submitted in this matter contains no less than one thousand pages of affidavits, expert testimony, and evidentiary support to illustrate the very real chilling effects felt in the past. It is not so much that Petitioners compiled too little of an evidentiary record for the Ninth Circuit Court of Appeals' analysis, but that they never should have been demanded to produce so much. Inconsistent application of this Court's chilling effects doctrine by lower courts nationwide produced this uncertainty, giving rise for this Court to give clarity and reinforcement to its doctrine.

b. Inter-Circuit Deterioration of the Chilling Effects Doctrine Spells Constitutional Anarchy

Should speakers facing facially unconstitutional laws be demanded to engage in burdensome,

evidentiary-driven litigation just to speak? To Justice Brennan, this concept would prove absurd, for the very purpose of the doctrine is to afford ease of access to the courts for a streamlined adjudication of the matter at hand, thus making the securement of the First Amendment a veritable truth rather than a legal fiction. *See* Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L.REV. 808, 822 (1969) ("chilling is used to emphasize the importance of facilitating the exercise of the freedoms of speech and association and to underline the consequences which the Court's decision will have for others similarly situated with the plaintiff"). The Ninth Circuit's passing acknowledgement of the chill suffered by speakers in this challenge only represents the further confusion among federal appellate courts on this matter.

For some time, courts nationwide have split in their authority over just how chilled one must be to properly demonstrate standing as well as a consequential injury to be remedied. Related to this challenge, several appellate circuits split on the very issue of chill and whether challengers to similar systems had alleged a cognizable injury. *See, e.g.*, *N.C. Right to Life Comm. Fund for Indep. Political Expenditures v. Leake*, 524 F.3d 427 (4th Cir. 2003); *Daggett v. Comm'n on Gov'tal Ethics and Election Practices*, 205 F.3d 445 (1st Cir. 2000); *Day*, 34 F.3d 1356. The First and Fourth Circuits rejected challenges to public financing schemes due, in part, to the courts' inability to find any cognizable chilling injury.

The Eighth Circuit, however, found similar matching fund provisions to work a cognizable chilling effect against speakers. Disparate understanding of the chilling effects doctrine effectuates constitutional anarchy, leaving speakers to guess which version of the chilling effects doctrine might guide their prospective conduct.

Beyond inter-circuit confusion, the Ninth Circuit regularly applies its own watered-down version of the chilling effects doctrine that makes it increasingly difficult for speakers to obtain relief. The Ninth Circuit examines a host of illuminating factors, including: Whether the government has "indicted or arrested the plaintiffs," if a "specific warning" has been communicated, or if there is a regular pattern of past enforcement. *See Lopez v. Candaela*, 2010 WL 512866 (9th Cir. 2010); *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc); *Adult Video Ass'n v. Barr*, 960 F.2d 781, 785 (9th Cir. 1992), *vacated sub nom. Reno v. Adult Video Ass'n*, 509 U.S. 917 (1993), *reinstated in relevant part*, 41 F.3d 503 (9th Cir. 1994). Indeed, the Ninth Circuit's treatment of the chilling effects doctrine turns *Dombrowski* on its head, which resolved that "those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious." 380 U.S. at 491 (Brennan, J., delivering the opinion of the Court). To resolve this disparate treatment, both within and without the Ninth Circuit, this Court should clarify its chilling effects doctrine, especially as it relates to post-standing

injury inquiries performed by the federal courts. In doing so, it should, as Chief Justice Roberts announced, err on the side of protecting speech. *See WRTL*, 551 U.S. at 457.

III. Of "Metaphysical Harms" and Bloodied Noses: The Ninth Circuit's Errant First Amendment Injury Inquiry

The Ninth Circuit's opinion in this case offers a disturbingly dismissive analysis of the chilling effect of the matching funds provision in the Arizona Clean Elections Act. *See* A.R.S. § 16-952 (2010). The Petitioners offer a compelling rebuttal to the appellate court's narrow interpretation of *Davis*, which previously applied strict scrutiny to speech balancing. Brief of Arizona Free Enterprise Club's Freedom Club PAC, et al., 29-32. However, even if "*Davis* does not require this Court to recognize mere metaphysical threats to political speech as severe burdens," *McComish*, 611 F.3d at 522, the burdens of matching contributions on traditional candidates and independent expenditure committees satisfy this Court's standards, and requires that the law in question pass strict scrutiny. Furthermore, if it is not reversed the opinion below will exhibit a chilling effect all its own, for it devolves the chilling effects doctrine to a case-by-case inquiry that already displays indifference – if not callousness – towards political speech.

a. The Harms Alleged by Petitioners Adequately Satisfy This Court's Standards

This Court has decided a number of First Amendment challenges relating to political speech. This robust case law applies strict scrutiny to campaign expenditure limits, *Randall v. Sorrell*, 548 U.S. 230, 241-42 (2006), and independent expenditure restrictions, *WRTL*, 551 U.S. at 464-65 (2007). Though unrecognized by the Ninth Circuit, the harms of the matching funds provision meet or exceed the burdens recognized in these cases. These burdens are felt by traditional candidates and independent expenditure committees who wish to advocate on their behalf.

The candidate-plaintiffs entered their elections choosing to eschew public funds and to garner support traditionally by raising money from supporters. Many independent expenditure committees support traditional candidates for this very reason. In Arizona primaries and general elections, after a traditional candidate spends individually past a certain threshold or does so in combination with the support of independent expenditures, the expenditures are matched with public funds that are dispersed to any and all participating opponents. Efforts to get a message out are curtailed through a public supply of funding for a contrary message, namely, to elect someone besides the traditionally supported candidate. Although matching funds are not directly drawn from traditional candidates or independent expenditure committees, it is their speech that triggers the

matching funds, thereby forcing them to choose between not speaking at all or speaking and unleashing support for the dissemination of their opponents' views. *See generally Pacific Gas and Elec. Co.*, 475 U.S. at 9-18. The Ninth Circuit concluded that this is merely a metaphysical burden, and that "[traditional candidates] have [not] been silenced, but . . . the speech of their opponents has been enabled." *McComish*, 611 F.3d at 524. But this chill is real on the face of the law, and was evidenced by candidates and committees foregoing fundraising, declining to make expenditures and delaying their speech to avoid the harmful consequences.

The Ninth Circuit did not believe the claims of fundraising avoidance: "Several Plaintiffs testified that they would have made increased expenditures or undertaken increased fundraising but for the matching funds provision. No Plaintiff, however, has pointed to any specific instance in which she or he has declined a contribution or failed to make an expenditure for fear of triggering matching funds." *Id.* at 523. But it is a fallacy to conclude that a candidate could not have avoided fundraising simply because one accepted all contributions that came and expended money that was on hand. On their word, the candidate-plaintiffs would have undertaken more fundraising efforts but for matching contributions. *Id.* at 517-19. When a law prompts candidates to avoid important campaign activities that would help them facilitate political speech, it is a chill on speech. *See* 09A1163 Reply App. 28.

In addition to the plaintiffs-candidates' claims, there is ample evidence of candidates not merely declining to fundraise, but declining to make expenditures. John Munger, a traditional candidate for Governor of Arizona, stated in a sworn declaration that he declined to spend $25,000 in the primary election because this expenditure would have allowed for matching disbursements of $25,000 (less 6%) to both Jan Brewer and Dean Martin, his publicly financed opponents. *Id.* at 9-10. "I could not in good faith or conscience spend the $25,000 of my own personally contributed funds to project my ideas to the public knowing that matching funds continued to threaten to provide millions of dollars to finance hostile opposing speech by participating gubernatorial candidates." *Id.* Although the plaintiff-candidates could not cite specific expenditures that they declined to make, the matching funds provision has caused such actions and, if it is allowed to stand, will continue to discourage political speech.

Besides foregoing fundraising and expenditures, there is heightened caution behind every expenditure a traditional candidate makes over the matching threshold, caution that amounts to a cognizable burden. Plaintiff Tony Bouie adopted this caution, worried that he needed to conserve his money in the event of independent expenditures in support of his candidacy "'backfiring.'" *McComish*, 611 F.3d at 518. Again, the record offers evidence that the plaintiffs are far from the only traditional candidates bearing this burden. Eric Ulis, a traditional candidate for the

Arizona House of Representatives, faced three participating candidates and two traditional candidates in the primary election. 09A1163 Reply App. 12. He intended to spend $10,000 over the cap, triggering almost $30,000 in matching funds for his opponents. *Id.* He summarized the burden: "[F]or every dollar I spend above the spending limit . . . nearly three dollars will be paid to my opposing participating candidates in matching funds to spend against me." *Id.* This put a great deal of chill upon his campaign actions: "[U]ncertainty is making me fear contributing and spending money in support of my campaign." *Id.* at 13. Although Ulis would not forego spending, he intended to alter the timing of his expenditures: "Most likely this will involve delaying the funding and spending of money in support of my campaign, which will detract from the effectiveness of my communications and deny Arizonans from hearing my message in a timely way." *Id.* The declarations of traditional candidates Michael Blaire and Dusti Leeann Morris also evidence these actions. *Id.* at 15-21.

The court below addressed the chill behind altered timing, but wrote it off because it aligns with common political strategy: "Many campaign finance regulations, particularly disclosure requirements, lead candidates to engage in such strategic behavior, but this does not make them unconstitutional." *McComish*, 611 F.3d at 524. Specifically, "waiting until [the weeks immediately before the election] to make campaign expenditures would not necessarily

be evidence of coerced behavior," because that is when the public begins to concentrate on elections. *Id.* Indeed, in a campaign there is often a last-minute push amounting to a large percentage of the campaign's total expenditures, but a law that all but forces this to be the case is not excused because of common practice: for those who would prefer a different strategy, matching funds is a burden, or a chill on how they would rather speak. Specifically, the Ninth Circuit did not consider this deterrent in light of the efforts required to challenge incumbents, which often involve serious expenditures well before the weeks immediately prior to an election. This Court has previously recognized that the electoral process is harmed "by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." *Randall*, 548 U.S. at 232. The altered timing exhibited by candidates and independent expenditure committees to prevent quasi-contributions to their opponents is further evidence of the chill of matching funds.

The issue of overwhelming matching – that is, the consequence many traditional candidates and independent expenditure committees seek to avoid with the behaviors described above – was not addressed by the Ninth Circuit. This issue is especially compelling: a number of primary elections in Arizona involve more than two candidates, and if just one refuses to participate in public funding and exceeds the expenditure trigger (or receives excessive support from independent expenditures) the candidates who

participate in public financing will each receive matching funds. This has not only proven to directly discourage the political speech of traditional candidates, but has allowed for political games that heighten the burden: if Candidate X is a traditional candidate facing more than one participating candidate, and a contributor or independent expenditure committee have such a bad opinion of Candidate X that their mantra is "Anybody but Candidate X," they can contribute or independently expend on *behalf* of Candidate X to allow for double, triple, or even quadruple public funds to be spread out among the participating candidates. This is not merely a thought experiment, it has occurred within the "clean elections" in Arizona. *See* Declaration of Dr. Marcus Osborn, 09A1163 Reply App. 62-66. So, it is not merely a match that traditional candidates and independent expenditure committees seek to avoid, but often an overwhelming deluge of funds for speech that opposes their own.

Avoiding fundraising and declining or delaying expenditures is ample evidence of the chill matching funds effects on the speech of traditional candidates and independent expenditure committees: but for matching contributions, they would speak more freely. And matching is the lightest punishment for speaking beyond the expenditure threshold: in many primary elections, "matching" amounts to two, three, or even more opposing dollars for each dollar spent. Because these display a direct burden upon the expenditure of campaign funds, this Court should

apply strict scrutiny in line with *Randall*, *WRTL*, and other political speech precedents. *See* 548 U.S. at 241-42; 551 U.S. at 464-65.

b. Devolution of the Chilling Effects Doctrine into an Ad Hoc, Case-by-Case Inquiry Causes Serious Harms

This Court's precedents show that campaign finance laws that chill the expression of political speech are subject to strict scrutiny. In this case, the Ninth Circuit has all but shunned this precedent, and has issued a ruling that will have a chill all its own if it is upheld. In addition to establishing the chill standard, this Court has recently emphasized the importance of quick resolution to questions of free speech: "To safeguard [freedom of speech], the proper standard for an as-applied challenge . . . must entail minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation. And it must eschew 'the open-ended rough-and-tumble of factors,' which 'invit[es] complex argument in a trial court and a virtually inevitable appeal.'" *WRTL*, 551 U.S. at 469 (internal citations omitted). This Court reaffirmed this principle last year in *Citizens United*, 130 S.Ct. at 896.

The Joint Appendix for this case is over one thousand pages long, and has reached this Court after over a year of litigation. *See* JA 1-1025. Petitioners and *amici* diligently describe numerous instances of the

chill that matching contributions play upon political speech that were acknowledged by the District Court, dismissed on appeal, and granted review by this Court. In sum, this case is everything the proper standard seeks to avoid. Thus, this Court should not only recognize the chill of matching funds and apply strict scrutiny, it should lay out a chill standard that prevents the need for a team of lawyers and appeal to the Supreme Court just to vindicate speech. Speakers should not be forced to shoulder the burden of compiling lengthy expert opinions, affidavits, and protracted evidentiary support just to speak; this Court's chilling effects doctrine suggests an easier and more direct remedy of constitutional injuries of this ilk. *See Citizens United*, 130 S.Ct. at 923 ("Because *Austin* is so difficult to confine to its facts – and because its logic threatens to undermine our First Amendment jurisprudence and the nature of public discourse more broadly – the costs of giving it *stare decisis* effect are unusually high.").

What this Court explained in *WRTL* holds equally true here: Burdensome litigation works itself a chilling effect against would-be speakers. A good deal of that burden has arisen from inter- and intra-circuit confusion over the proper rigor of the chilling effects doctrine. In that case, that confusion led to more than one thousand pages submitted through a drawn-out Joint Appendix, submitted just so individuals could speak. To restore sanity to the chilling effects doctrine, this Court must clarify and liberalize the scope of its reach.

The matching funds provision of the Clean Elections Act chilled the speech of traditional candidates and independent expenditure committees. These harms were real, yet were carved out and dismissed by the Ninth Circuit, opening the door to future case-by-case inquiries into future chilling speech laws. This Court should recognize the blatant chill found here and clarify the standard used to determine chill, to ensure that "complex arguments in a trial court and a virtually inevitable appeal" are never again the standard needed to allege something so simple as a chill.

IV. Keep Speech Standards Simple: Building on the Import of *Citizens United*

This Court's history in reviewing campaign finance reform laws and subsequent harms to political speech have raised more than a hint of frustration. *See, e.g.*, *WRTL*, 551 U.S. at 478-79 ("[T]o justify regulation of WRTL's ads, this interest [in preventing corruption or the appearance of corruption] must be stretched yet another step to ads that are not the functional equivalent of express advocacy. Enough is enough."). Unlike recent cases, Arizona's "Clean Elections" system does not call for curbing the reach of agency interpretation,[5] but the rogue standards of a

[5] The Clean Elections Commission, entrusted with dispersing matching funds, has lobbied the Arizona Legislature to repeal the matching funds provision. 09A1163 Reply App. 53-54.

federal court of appeals. Instead of facing an expansion of discombobulating regulations, this Court is now confronted with a strike to the very heart of First Amendment jurisprudence: if the Ninth Circuit is upheld, it will not expand a compelling state interest, but will greatly expand the types of speech burdens deemed acceptable under the law. This calls for an affirmation of the simple standards this Court has repeatedly endorsed to protect free speech.

a. The Tie Goes to the (Chilled) Speaker

The Ninth Circuit went to great lengths to distinguish *Davis* from Arizona's matching funds regime, and the facts in this case are certainly different. *See McComish*, 611 F.3d at 521-23. However, the First Amendment does not merely protect speech that neatly fits into previous cases. *See Miami Herald Pub. Co.*, 418 U.S. at 256 ("Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." (citing *Grosjean v. American Press Co.*, 297 U.S. 233, 244-45 (1936))). Especially in the context of campaign finance, this Court has elaborated bright line principles for free speech that should be given far more credence than the facts that led to their pronouncement: "The First Amendment requires us to err on the side of protecting political speech rather than suppressing it." *WRTL*, 551 U.S. at 457. Moving this Court's First Amendment jurisprudence toward a bright line standard, like that

found in *WRTL* or *Buckley* would greatly improve future speakers' chances in court.

Matching funds chill the political speech of traditional candidates and independent expenditure committees. This calls for strict scrutiny, which requires the government to elaborate a compelling state interest and show that the law is narrowly tailored to achieve that interest. *Citizens United*, 130 S.Ct. at 882. In considering the law's application, "the tie goes to the speaker, not the censor." *WRTL*, 551 U.S. at 474. The Ninth Circuit avoided this analysis entirely, denying that political speech is affected, or, if so, merely affected metaphysically. Instead of working within the First Amendment analysis, courts now seek to avoid it entirely. The analysis, however, should be unequivocally inclusive, and this Court should elaborate such a cohesive First Amendment standard.

b. Toward a Cohesive Speech-Protective Standard

Building on this Court's development of First Amendment jurisprudence in *WRTL* ("the tie goes to the speaker") and *Citizens United* ("a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated"), *McComish* is an opportunity to strengthen this Court's chilling effects doctrine to protect the speech of average Americans. 541 U.S. at 474; 130 S.Ct. at 896. Facing a statute whose inhibitory reach likely smothers,

suffocates, and otherwise squashes protected First Amendment liberties, but which might find some valid application, this Court should not presume in favor of the statute, but in favor of free speech and association. *See WRTL*, 541 U.S. at 474; *see also Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 95-98 (1983); *In re Primus*, 436 U.S. 412, 433-38 (1978); *Buckley*, 424 U.S. 1; *Mosley*, 408 U.S. at 100-01; *Stanley v. Georgia*, 394 U.S. 557, 566-67 (1969); *United States v. Robel*, 389 U.S. 258, 264, 267 (1967); *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217, 222-23 (1967); *NAACP v. Alabama*, 357 U.S. 449, 462-65 (1958).

Some Federal Circuit Courts of Appeals treat the chilling effects doctrine as if it were a toss-aside, supplementary component in free speech challenges. *See, e.g., Leake*, 524 F.3d 427; *Daggett*, 205 F.3d 445. As described by Justice Brennan and later Justices of this Court, the doctrine plays an essential role in maintaining our representative democracy. *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 884 n.192 (1991) ("The First Amendment, more even than other constitutional provisions conferring fundamental rights, contributes vitally to the preservation of an open, democratic political regime, at the same time as it secures rights of high importance to particular individuals").

What this Court held in *Citizens United* remains true here: "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research,

or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech." 130 S.Ct. at 889. In the same manner, the First Amendment does not permit laws that force speakers to retain campaign finance attorneys, conduct clean elections-spending research, or seek declaratory and injunctive rulings just to cure expansive chilling effects found in state campaign finance reform systems. More than one thousand pages of Joint Appendix submissions demonstrating cognizable chill injuries cannot be this Court's standard for free speech.

Just what does such a speech favoring test look like? First, judicial tests that purport to balance the interests of the First Amendment should err in favor of the motivational direction of the Amendment – to preserve free speech. This Court has already taken steps in that direction in *WRTL*. Second, the chilling effects doctrine should mean what it has traditionally meant: Speakers should not have to go to great lengths and costs to allege a chilling infringement on their First Amendment rights. Rather, where the plain scope of the law directly inhibits speech, as it does here, and the challengers are within the affected class of speakers, judicial resolution should be swift. *See WRTL*, 551 U.S. at 469 (proper speech standards "allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation"). While being efficient, review must also be serious. That is, just because harms are hypothetical,

as is allowed under the chilling effects doctrine, the burden analysis should not somehow become diminished. Strict scrutiny and the chilling effects analysis go hand in hand. *See MCFL*, 479 U.S. at 265; *see also Speiser v. Randall*, 357 U.S. 517 (1958).

To give substantive effect to the chilling effects doctrine, this Court should synthesize its speech-favoring rules stated in *WRTL* and *Citizens United*: "Where the First Amendment is implicated, the tie goes to the speaker, not the censor" and "a statute which chills speech can and must be invalidated where its facial invalidity has been demonstrated." 551 U.S. at 474; 130 S.Ct. at 896. With the noted inter- and intra-Circuit confusion over the chilling effects doctrine, reinforcement must be given. The First Amendment cannot demand that speakers submit more than one thousand pages of evidentiary support just to allege a chill so they might speak about the merits of candidates for public office.[9]

---

[9] Petitioners raised their challenges in this matter in both an as-applied and facial manner. First Amd. Compl. at ¶1 (seeking to have the "matching funds" provisions declared unconstitutional facially and as applied). Moreover, "once a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases." *Citizens United*, 130 S.Ct. at 894 (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1339 (2000)).

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Ninth Circuit below and reinstate the District Court's order permanently enjoining Respondent from enforcing the Matching Funds Provision.

Respectfully submitted,

WYOMING LIBERTY GROUP
BENJAMIN T. BARR*
STEPHEN R. KLEIN
1902 Thomes Ave.
Ste. 201
Cheyenne, WY 82001
(240) 863-8280
Benjamin.Barr@gmail.com
Counsel of Record